No. 90-600

FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

J.D. FARMER, JR.,
Petitioner,
v.
STEPHEN E. HIGGINS, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE CENTER TO PREVENT HANDGUN VIOLENCE LEGAL ACTION PROJECT, NATIONAL FRATERNAL ORDER OF POLICE, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, MAJOR CITY CHIEFS, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, POLICE EXECUTIVE RESEARCH FORUM, AND POLICE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LLOYD N. CUTLER
JAMES S. CAMPBELL
(Counsel of Record)
GAIL A. ROBINSON
DAVID S. BERNSTEIN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DENNIS A. HENIGAN
Director, Legal Action Project
CENTER TO PREVENT
HANDGUN VIOLENCE
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 289-7319

Attorneys for Amici Curiae

December 13, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS AND STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF FOR CENTER TO PREVENT HANDGUN VIOLENCE, *ET AL.*, AS *AMICI CURIAE*

This brief is submitted on behalf of *amici curiae* in opposition to the petition for certiorari. By letters filed with the Clerk of the Court, petitioner J.D. Farmer, Jr. and respondent Stephen E. Higgins, Director, Bureau of Alcohol, Tobacco & Firearms have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

The Center to Prevent Handgun Violence and seven major law enforcement organizations have joined together to submit this *amicus* brief out of a shared concern that the availability of machine guns to the general public, as sought by petitioner herein, presents an unacceptable threat to public safety.

The *amici* are the following organizations:

The *Center to Prevent Handgun Violence* is a nonprofit organization dedicated to reducing deaths and injuries from the misuse of firearms.

The *National Fraternal Order of Police* is the largest member organization of professional law enforcement officers in the United States, representing over 217,000 federal, state and local law enforcement professionals from the rank of police officer to chief.

The *International Association of Chiefs of Police* is the world's largest association of police executives, representing more than 15,000 members from the United States and 67 other countries.

The *Major City Chiefs* is made up of the chief executives of 47 of the larger city police departments in the United States.

The *National Association of Police Organizations* represents over 100,000 rank-and-file police officers throughout the nation.

The *National Organization of Black Law Enforcement Executives* is an organization of police chiefs, command-level law enforcement officials, criminal justice educators and others interested in opening

channels of communication between law enforcement and the community.

The *Police Executive Research Forum* is the national professional association of chief executives of large- and medium-sized city, county and state police departments. The Forum's general members have responsibility for the delivery of police services to over thirty percent of the nation's population.

The *Police Foundation* engages in research and experimentation to test the practices of police agencies as a means of enhancing the ability of the police to control crime, maintain order and deliver services to citizens.

Each of the *amici* has a substantial interest in this case. Through its Legal Action Project, the Center to Prevent Handgun Violence participates as *amicus curiae* in litigation, often in opposition to the National Rifle Association,[1] to protect the authority of government to enact and enforce reasonable laws to prevent gun violence. The seven law enforcement organizations represent the police officers who, together with the communities they serve, face the threat of gun violence by heavily armed drug dealers, gang members and organized criminals. The support of the law enforcement community was critical to the passage of the legislation banning machine guns that petitioner now seeks to nullify by judicial action.

STATEMENT OF THE CASE

The challenged statute, 18 U.S.C. § 922(o), prohibits the private possession of machine guns not lawfully possessed before May 19, 1986. Before the enactment of Section 922(o), private ownership of machine guns was permitted if a permit was obtained from the Bureau of Alcohol, Tobacco and Firearms (the "Bureau").

In October 1986, petitioner applied to the Bureau for a permit to make and register a machine gun for

---

[1] Attorney Richard Gardiner, who appears on the petition as one of petitioner's counsel, is on the staff of the National Rifle Association.

possession in his personal collection. The Bureau denied his application based on Section 922(o). Petitioner asserts that the Bureau's denial of his application was in error because Section 922(o) does not prohibit the private possession of machine guns. He further asserts that if the statute does prohibit the private possession of machine guns, it violates the right to "keep and bear arms" under the Second Amendment of the United States Constitution and is beyond Congressional power under the Commerce Clause.

The court below rejected petitioner's arguments. It held that Section 922(o) clearly prohibits the private possession of machine guns not lawfully possessed before May 19, 1986, and that the Bureau's refusal to issue the petitioner a machine gun permit was therefore correct. The court also rejected petitioner's federal constitutional arguments as without merit.

SUMMARY OF THE ARGUMENT

This case presents no substantial question requiring the attention of this Court. There is no conflict among the circuits or state courts of last resort on any of the issues that petitioner offers for review. The ruling of the court below was fully consistent with the plain language and legislative history of the statute and with prior decisions of this Court.

The plain language of Section 922(o) clearly prohibits the private possession of machine guns not lawfully possessed before May 19, 1986. Petitioner's interpretation of the statute would leave prior law unaltered, thereby making the statute a nullity. Moreover, even a cursory reading of the legislative history leads to the inescapable conclusion that Congress intended to ban these extremely dangerous combat weapons.

The Second Amendment does not prohibit legislative restrictions of the kind contained in Section 922(o) on the private possession of firearms. The amendment restricts only governmental actions that adversely affect the arming of a state's organized militia. The

decided cases provide no support for petitioner's assertion that the Second Amendment creates a right to be armed for private purposes. Moreover, even if a private constitutional right to keep and bear arms did exist, it would be subject to reasonable regulation in the interest of public welfare and safety.

Contrary to petitioner's claims, Congress acted within its broad authority under the Commerce Clause when it sought to halt the nationwide proliferation of machine guns.

ARGUMENT

I. SECTION 922(o) PROHIBITS PRIVATE PERSONS FROM POSSESSING MACHINE GUNS NOT LAWFULLY POSSESSED BEFORE MAY 19, 1986

A machine gun is a firearm capable of automatic fire, *i.e.*, it continues to fire as long as the trigger is depressed and there is ammunition in the magazine.[2] Because of this unique characteristic, machine guns are capable of extremely rapid fire. For example, tests conducted by the San Jose Police Department showed that an Uzi submachine gun is capable of firing an entire 30-round magazine in slightly less than two seconds.[3] In addition, machine guns typically come equipped with detachable ammunition magazines holding anywhere from 30 to hundreds of rounds of ammunition.[4] Thus, the shooter can easily and quickly replace a used magazine with a new one, making the machine gun capable of extraordinary firepower.

---

[2] For purposes of Section 922(o), the term "machine gun" is defined as

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

18 U.S.C. § 921(23), incorporating 26 U.S.C. § 5845(b) (1988).

[3] McNamara, *Developing A Rational National Firearms Policy*, The Police Chief 26 (March 1988).

[4] I. Hogg & J. Weeks, *Military Small Arms of the 20th Century* 69-121, 158-203, 204-208 (5th ed. 1985).

Before 1986, Congress sought to control the possession of machine guns by private persons by requiring that such persons obtain a permit from the Bureau.[5] By 1986, however, Congress recognized that despite this regulatory regime, "machine guns ha[d] become a far more serious law enforcement problem."[6] Law enforcement witnesses testified to an increase in crimes committed with automatic weapons[7] and an increasing threat to police officers from criminal suspects armed with such automatic weapons.[8]

Congress therefore took steps to prohibit the private possession of machine guns. It enacted Section 922(o), which states:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.
>
> (2) This subsection does not apply with respect to—
>
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or

---

[5] 26 U.S.C. §§ 5821, 5822 and 5841 (1988).

[6] 132 Cong. Rec. 9602 (1986) (statement of Sen. Kennedy).

[7] *See, e.g., Legislation to Modify the 1968 Gun Control Act: Hearings Before the Subcommittee on Crime of the House Committee in the Judiciary*, 99th Congress, 1st & 2d Sess. 58-59 (1985-86) (testimony of Cornelius Behan, Chief of Police, Baltimore County, Md.); *Id.* 80-81 (testimony of Benjamin Ward, Police Commissioner, City of New York); *Id.* at 1004 (statement of Lyman H. Shaffer, former Special Agent in Charge Firearms Enforcement Branch, Bureau of Alcohol, Tobacco and Firearms); *Id.* at 1027-28 (testimony of Dr. Michael R. Matell, President, National Police Psychiatric Association); *Id.* at 1086 (statement of Captain C. Lee Thompson, Missouri State Highway Patrol). In addition, in a letter to Representative Hughes included in the hearing record, Bureau Director Higgins reported that "machine guns are the weapon of choice for a wide range of criminals." *Id.* at 224.

[8] The Federal Bureau of Investigation reported that in 1985, police officers had been fatally wounded by automatic weapons in Missouri, Alabama, California, and South Carolina. 1985 FBI Uniform Crime Reports, *Law Enforcement Officers Killed and Assaulted* 29-36.

> a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machine gun that was lawfully possessed before the date this subsection takes effect.[9]

Following enactment of Section 922(o), the Bureau issued regulations defining the exception in subsection (2)(A) to apply only to those machine guns to be made and registered "for the benefit of a Federal, State or local governmental entity." [10]

Petitioner challenges the Bureau's interpretation of Section 922(o). Petitioner contends that so long as he obtains a machine gun permit from the Bureau, he will possess the weapon "under the authority of the United States" and therefore will fall within proviso (2)(A) of the statute, and that the Bureau is obliged under 26 U.S.C. §§ 5821, 5822 and 5841 to grant him a permit. Petition ("Pet.") at 6-9. In effect, petitioner asserts that the law remained unchanged after enactment of Section 922(o). This reading is wholly inconsistent with both the plain language and legislative history of Section 922(o).

The plain language of Section 922(o) makes clear that the statute prohibits private possession of machine guns not lawfully possessed prior to May 19, 1986. The statute explicitly provides that except in two carefully delineated circumstances, "it shall be unlawful for any person to transfer or possess a machine gun." Petitioner's reading of the statute effectively eliminates this prohibitory language from the statute, leaving the law unchanged from the pre-1986 period. Before 1986, a private person could possess a machine gun if a permit from

---

[9] Section 110(c) of the statute provides that the effective date of Section 922(o) is May 19, 1986. Pub. L. No. 99-308, § 110(c), 100 Stat. 449, 461 (1986).

[10] 27 C.F.R. § 179.105(e) (1989). The regulations proscribe possession of all other machine guns not lawfully possessed before May 19, 1986. *See id.* at §§ 179.105(a) and (b).

the Bureau was obtained. Under petitioner's reading of the statute, the exact same condition applies today.

Petitioner's construction also renders superfluous the grandfather clause in Section 922(o)(2)(B). If Congress did not intend to change prior law and prohibit the private possession of machine guns after May 19, 1986, then it was wholly unnecessary to include a provision allowing for the continued private possession and transfer of machine guns lawfully possessed before that date. Because statutory language must be construed to avoid the assumption that Congress enacted legislation with no substantive effect, *United States v. Turkette*, 452 U.S. 576, 580 (1981), petitioner's artificial construction of the statute must be rejected for this reason as well.[11]

If any doubt concerning the meaning of the statute remained after reading its plain language, the available legislative history makes crystal clear Congress' intent to enact a general machine gun ban subject to only limited exceptions. The legislation that was codified as Section 922(o) was introduced in the House by Representative Hughes, who requested "an opportunity to explain why machine guns should be banned" and observed that "I do not know why anyone would object to the banning of machine guns." 132 Cong. Rec. 7085 (1986). When the legislation was taken up in the Senate, it was similarly and repeatedly referred to as a machine gun ban. *Id.* at 9599, 9602, 9605.

---

[11] Petitioner attempts to give some meaning to the statute as he construes it by claiming that Section 922(o) shifts the burden of proof on registration from the government to the defendant in a criminal prosecution involving the possession of a machine gun. Pet. at 12-13. This interpretation lacks any support in either the text of the statute or its legislative history. Although, as discussed below, members of Congress repeatedly referred to Section 922(o) as a ban on the private possession of machine guns, they made no reference whatever to a desire to shift the burden of proof on the issue of registration and made no mention of any problem in proving the absence of registration in prosecuting violators.

As to the meaning of the exemption for transfers "by or under the authority of the United States," a colloquy between Senators Dole and Hatch eliminated any possible ambiguity. Senators Dole and Hatch discussed various factual situations in which this exemption might apply. Without exception, all involved sales to the military, police groups, defense contractors authorized to make weapons systems, or foreign govenrments. *Id.* at 9600-01. Absolutely no reference was made to private citizens possessing machine guns under the authority of government permits. Indeed, Senator Dole raised the question of whether the exemption was broad enough to allow a local police force to authorize its officers to purchase machine guns to be owned by the officer rather than the police department. Senator Hatch responded that it was, but that if the police officer left the force, the exemption would cease to apply and the machine gun would have to be transferred to "another entity authorized by the State or the United States to possess such weaponry." *Id.* at 9601. Neither Senator Dole's question nor Senator Hatch's response makes any sense if Section 922(o) permits the continued private possession of machine guns pursuant to government permits.

In enacting Section 922(o), Congress plainly did not believe it was merely maintaining the *status quo* with regard to machine gun regulation. Congress was confronted with evidence of the mounting use of machine guns as weapons of crime and pleas by police organizations to take steps to address the problem. Congress responded by freezing the number of machine guns in private hands that could be stolen and used to commit crimes.

II. FEDERAL LIMITS ON CIVILIAN POSSESSION OF MACHINE GUNS DO NOT VIOLATE THE SECOND AMENDMENT

The court below appropriately rejected without discussion petitioner's argument that the 1986 machine gun statute violates the Second Amendment to the Constitution. That ruling made no new Second Amendment law

and need not be reviewed by this Court. The federal courts have unanimously held that the Second Amendment guarantees the people's right to be armed for purposes of participating in an organized state militia, not the right to possess weapons for private purposes unrelated to the militia. This consistent judicial interpretation of the amendment is entirely in accord with the original intent of the Framers, as demonstrated by the constitutional debates. Moreover, even if the Second Amendment guaranteed a private right to be armed, the right would not be absolute, but would permit enactment of a machine gun ban as a reasonable regulation in the interest of public safety.

Before summarizing the well-established jurisprudence of the Second Amendment, the amici organizations wish to point out the frightening implications of petitioner's argument. Petitioner contends that the test for determining whether private possession of a given firearm is constitutionally protected is whether it is "ordinary military equipment," the use of which "could contribute to the common defense." Pet. at 27. Under petitioner's analysis the Second Amendment's protection would extend not only to possession of machine guns, but also to possession of bazookas, hand grenades, Stinger missiles, and any other weapon of mass destruction which an individual could "keep and bear" and which could have a military use. The public safety implications of such a position are truly staggering. No court has ever interpreted the Second Amendment as a restraint on the power of the federal government to restrict the dissemination of weapons of war among the general public.

A. Federal Case Law Uniformly Recognizes that the Second Amendment Does Not Guarantee An Individual Right to Possess Machine Guns for Personal Purposes Unrelated to the Operation of an Organized Militia

The Second Amendment to the United States Constitution reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to

keep and bear Arms, shall not be infringed." This Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), establishes that the central concern of the Amendment is the protection of organized state militia, not personal possession of firearms.

In *Miller*, the Court held that the Second Amendment did not bar the prosecution of two individuals for transporting a sawed-off shotgun in interstate commerce without having registered the weapon as required by the National Firearms Act of 1934 ("NFA").[12] The Court found that the "obvious purpose" of the Second Amendment was to "assure the continuation and render possible the effectiveness of" state militia, and cautioned that the Amendment "must be interpreted and applied with that end in view." *Id.* at 178. The Court upheld the NFA as applied to sawed-off shotguns, noting that they bear no "reasonable relationship to the preservation or efficiency of a well regulated militia. . . ." *Id.*

Since *Miller*, the federal courts have consistently read the Second Amendment to guarantee the people's right to keep and bear arms for the purpose of participating in an organized state militia, not as a guarantee of a constitutional right to maintain armaments for personal, non-militia purposes.[13] This remarkable unanimity among

---

[12] 26 U.S.C. §§ 5801-02 (1988).

[13] *See, e.g., Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1985); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Graves*, 554 F.2d 65, 66-67 n.2 (3d Cir. 1977); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. McCutcheon*, 446 F.2d 133, 135-36 (7th Cir. 1971); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1941), *cert. denied sub nom., Velazquez v. United States*, 319 U.S. 770 (1943); *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); *Thompson v. Dereta*, 549 F. Supp. 297, 299 (D. Utah 1982); *Vietnamese Fisherman's Assn. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981), *cert. denied*, 469 U.S. 842 (1984).

the federal courts was aptly summarized by the United States Court of Appeals for the Eighth Circuit when it said that the argument for a "fundamental right to keep and bear arms" in the Second Amendment "has not been the law for at least 100 years." *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988).[14]

Two decisions of this Court since *Miller* have reaffirmed this consistent interpretation of the Second Amendment.[15] In *Burton v. Sills*, 394 U.S. 812 (1969), this Court dismissed, for want of a substantial federal question, a gun owner's appeal from a New Jersey Supreme Court decision upholding a state gun control law. The New Jersey Court had held that the Second Amendment "was not framed with individual rights in mind" but rather "refers to the collective right 'of the people' to keep and bear arms in connection with 'a well regulated militia.'" [16]

In *Lewis v. United States*, 445 U.S. 55 (1980), this Court considered a challenge under the equal protection

---

[14] State courts have been equally consistent in this view. *See, e.g., State v. Fennell*, 382 S.E.2d 231, 232 (N.C. 1989); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C.), *cert. denied*, 108 S. Ct. 193 (1987); *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984); *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967); *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969); *Salina v. Blakesley*, 83 P. 619, 620 (Kan. 1905).

[15] This Court's ruling in *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), relied upon by petitioner, is not to the contrary. There, the Court held that the fourth amendment guarantee against unreasonable searches and seizures does not protect foreign nationals residing in foreign countries. In reaching this conclusion, the Court commented that the phrase "the people" in the Bill of Rights "refers to a class of persons who are part of a national community. . . ." *Id.* at 1058. In no sense did the Court address the question whether the right granted this "class of persons" in the Second Amendment was a right to be armed as part of an organized state militia or a right to be armed for personal purposes unrelated to the "well regulated militia" or the "security of a free state."

[16] *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969).

clause to the federal prohibition against ownership of firearms by convicted felons. The Court applied the "rational basis" test rather than a stricter level of scrutiny to the statutory distinction between felons and non-felons because "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, *nor do they trench upon any constitutionally protected liberties.*" *Id.* at 65, n.8. (emphasis added). The Court cited its holding in *Miller* that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.* (quoting *Miller*).[17]

In holding that a sawed-off shotgun bears no reasonable relationship to a well-regulated militia, the Court found no reason to believe that such a weapon "is any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178. Petitioner takes this to mean that if a weapon *is* "ordinary military equipment" or *could* "contribute to the common defense," its possession is thereby protected from federal regulation by the Second Amendment. It is clear, however, that a weapon's theoretical military utility cannot by itself establish that its possession is protected by the Second Amendment. Nothing in *Miller* endorses the far-fetched and enormously dangerous argument that so long as a particular weapon *may* have military utility, its possession by *any member of the general public* is therefore necessary "to render possible the effectiveness" of state militia.

The lower courts unanimously reject the idea that *Miller* impliedly sanctions constitutional protection for

---

[17] Petitioner mischaracterizes *Lewis* as holding only that felons are "not entitled to Second Amendment protection." Pet. at 28-29. As explained above, *Lewis* held that the constitutionality of the statutory prohibition of firearm ownership by felons is to be tested according to the less onerous "rational basis" level of scrutiny because the non-militia-related possession of firearms is not a constitutionally protected liberty.

private ownership of any weapon with a possible military use. In *Cases v. United States*, 131 F.2d at 916, the First Circuit conceded that the revolver at issue might have been "capable of military use," but rejected a Second Amendment challenge because there was "no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career." *Id.* at 923. Similarly, the Sixth Circuit, in *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976), upheld the registration requirement of the NFA as applied to machine guns, holding that to grant constitutional protection to private ownership of any military weapon would be "completely irrational in this time of nuclear weapons." *Id.* at 106.

The lower courts' unanimous conclusion that *Miller* does not guarantee the right of "all law-abiding persons," Pet. at 26, to possess military armaments is supported by the discussion of the nature of the constitutionally protected militia in *Miller*. In reviewing the history of the Second Amendment, the *Miller* opinion speaks of the "Militia which the States were expected to maintain and train" and which was "[a] body of citizens enrolled for military discipline." *Miller*, 307 U.S. at 178-79. The Court also reviewed the various colonial statutes requiring that militia members muster for service and that they maintain firearms for militia purposes. *Id.* at 180-81. Thus, the "well regulated militia" protected by the Second Amendment is an organized and trained military force under government direction and serving public purposes.[18] It is the keeping and bearing of arms by persons enrolled in that military force—not by the citizenry at large—that the *Miller* Court held to be the central concern of the Second Amendment.

---

[18] This Court's recent opinion in *Perpich v. Department of Defense*, 110 S. Ct. 2418, 2426 (1990), further confirms the nature of the constitutional militia as an active military force.

B. The Federal Courts' Unanimous "Militia" Interpretation of the Second Amendment Rests on Well-Established Historical Grounds

Ample historical support exists for the unanimous view of the federal courts that the intent of the Second Amendment was to preserve to the people, against encroachment by the federal government, a right to keep and bear arms for militia purposes.[19]

The Constitution was written at a time of tension between those favoring a strong central government with a professional standing army and those supporting state-controlled militia to preserve the people's security and liberty. Nowhere in the constitutional debates was there any discussion of a personal right to keep or bear arms for non-military purposes.

Many influential federalists, including George Washington, believed the militia had performed poorly during the war and were determined to establish either a professional standing army or a small, highly trained, centrally controlled militia.[20] Proponents of a strong national government worked for establishment of a professional army and simultaneously sought extensive central authority over the state militia to provide for uniformity in arms, discipline and training.[21] In contrast, the antifederalists strongly opposed establishment of a standing army or the transfer of authority over the militia from the states to the central government. They viewed the state militia as a protection from oppressive federal government, par-

---

[19] A detailed discussion of the historical origins of the Second Amendment is found in Ehrman and Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5 (1989).

[20] Letter of George Washington, September 24, 1776, *reprinted in*, Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 183 (1940).

[21] *See* 5 J. Elliot, *Debates in the Several State Conventions* 440 (1836 ed.); 2 Farrand, *Records of the Federal Convention* 330-31 (1974).

ticularly given the proposed establishment of a national standing army.[22]

The Militia Clauses of the original Constitution reflect a series of compromises, distributing power over the militia to both the state and federal governments.[23] One point critical to the antifederalists was, however, left unresolved: whether the power given to the federal government of arming and disciplining the militia was an *exclusively* federal power. If so, the antifederalists feared the possibility of disarmament of the militia through federal design or neglect.

The debate in the Virginia ratifying convention reflected the antifederalists' concerns. George Mason expressed the view that Article I, Section 8, Clause 16 of the Constitution gave the federal government exclusive power to arm the militia and prevented the states from doing so. Mason believed this exclusive power would allow Congress to destroy the militia by "rendering them useless by disarming them . . . congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for congress has an

---

[22] *See, e.g.*, the remarks of Elbridge Gerry: "By the edicts of an authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defense, and the security of liberty, is no longer to be under the control of civil authority; but at the rescript of the Monarch. . . ." Gerry, "Observations on the New Constitution and the Federal and State Conventions, 1788," *reprinted in*, 3 B. Schwartz. *The Roots of the Bill of Rights* 487 (1980).

[23] The states were given the power to appoint officers and train the militia, while the federal government was granted the power to organize, arm and discipline the militia as well as govern them while they were in the service of the United States. U.S. Const., art. I, sec. 8, cl. 16. Congress was given authority to call forth the militia to execute national laws, suppress insurrections and repel invasions. U.S. Const., art. I, sec. 8, cl. 15. The President was made commander-in-chief of the militia during times they were in service of the federal government, U.S. Const., art. II, sec. 2, cl. 1., while the states retained authority when they were not in national service. *See generally Perpich*, 110 S. Ct. at 2418.

exclusive right to arm them, etc." [24] Mason accordingly proposed a resolution calling for an amendment to the federal constitution that would expressly recognize the right of the states also to arm and discipline the militia.

Madison's initial draft of the Second Amendment read: "The right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." [25] The Senate, rejecting a motion to add opposition to standing armies in time of peace, dropped the religious exemption and rearranged Madison's original language, thus placing even greater emphasis on the militia aspect of keeping and bearing: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." [26]

C. Even if the Second Amendment Guarantees a Right to be Armed for Personal, Non-Militia Purposes, That Right Would Be Subject to Reasonable Legislative Regulation in the Interests of Public Safety

Even if one were to ignore the intent of the Framers and the overwhelming body of precedent establishing the "militia" purpose of the Second Amendment, one would still be left to determine the scope of the right guaranteed. In the 650 years of Anglo-American jurisprudence, no absolute right to be armed has ever been recognized. Rather any right to be armed has always been "subject to . . . well recognized exceptions arising from the necessities of the case," including restrictions for public welfare and security. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).[27]

---

[24] Mason's remarks are quoted in 3 Elliot, *supra* note 21, at 379.

[25] *See* 5 B. Schwartz, *supra* note 22, at 1026.

[26] *See* "Senate Journal, Aug.-Sept. 1789," *reprinted in*, 5 B. Schwartz, *supra* note 22, at 1149.

[27] In *Robertson*, this Court discussed several "well-recognized exceptions" to certain provisions of the Bill of Rights and stated

The necessity and propriety of regulating the possession and use of firearms was recognized at English common law as early as the fourteenth century, as well as in American colonial times. The Statute of Northampton, enacted in 1328, provided that no man shall "go nor ride armed by Night nor by Day in Fairs, Markets nor in the Presence of the Justices or other Ministers nor in no part elsewere . . . ." [28] The English Bill of Rights of 1689 made it clear that the right to be armed was subject to legislative control by providing that "subjects which are protestants may have arms for their defense suitable to their conditions *and as allowed by law*." [29] Various American colonies regulated firearms, including Massachusetts, Pennsylvania, South Carolina and Virginia.[30]

In light of the frightening array of weaponry available in the modern era, no civil society could long exist in which individuals had an absolute right to own whatever armaments they chose. As Congress has recognized, machine guns represent an especially great threat to the public safety. If, contrary to the Framers' intent, the Second Amendment had created a personal "right to keep and bear arms," that right would plainly be subject to legislative action to limit the availability of combat weapons to the general public.

---

that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." 165 U.S. at 281-82; *cf. Miller v. California*, 413 U.S. 15, 23 (1973) ("obscene material is unprotected by the First Amendment").

[28] 2 Edw. 3, ch. 3.

[29] 1 W. & M., sess. 2, ch. 2, *reprinted in*, 1 B. Schwartz, *supra* note 22, at 43 (emphasis added).

[30] Levin, *The Right to Bear Arms: The Development of the American Experience*, 68 Chi. Kent L. Rev. 148, 149-50 (1971).

III. CONGRESS HAS SUFFICIENT POWER UNDER THE COMMERCE CLAUSE TO PROHIBIT THE POSSESSION AND TRANSFER OF MACHINE GUNS WITHOUT REQUIRING A SPECIFIC CONNECTION WITH INTERSTATE COMMERCE

Petitioner relies on *United States v. Bass*, 404 U.S. 336 (1971), to challenge the constitutionality of Section 922 (o) as construed by the Bureau and the court below. Pet. at 22-25. In *Bass*, this Court interpreted a provision of federal law imposing penalties on a felon who "receives, possesses, or transports *in commerce or affecting commerce* . . . any firearm." 18 U.S.C. § 1202(a) (emphasis added). At issue was whether the language "in commerce or affecting commerce" modified "receives" and "possesses" as well as "transports." If it did not, then the respondent could be convicted under Section 1202(a) for possession of firearms without a showing that the possession took place "in or affecting commerce." Because the Court found the statutory language and legislative history inadequate for divining Congressional intent as to how the statute was to be applied, 404 U.S. at 339-42, the Court read the provision narrowly in favor of the defendant. The Court found that the defendant could only be convicted upon a specific showing of a nexus between his possession of a firearm and interstate commerce. *Id.* at 347.

Petitioner's reliance on *Bass* in this case is wholly misplaced. Unlike the statute at issue in *Bass*, Section 922 (o) contains no requirement, ambiguous or otherwise, of a nexus between machine gun possession and interstate commerce. In *United States v. Nelson*, 458 F.2d 556, 559 (5th Cir. 1972), and *United States v. Lebman*, 464 F.2d 68, 72 n.11 (5th Cir.), *cert. denied*, 409 U.S. 950 (1972), the former Fifth Circuit rejected similar *Bass* challenges to two other provisions of the Gun Control Act of 1968 principally for the reason that they, like Section 922(o),

do not contain the requirement of a nexus with interstate commerce.[31]

Petitioner is fundamentally in error when he states that Congress does not have the power to prohibit the possession of machine guns unless "an effect on, or nexus with interstate commerce [is] an element of the offense." Pet. at 22. In *Perez v. United States*, 402 U.S. 146 (1971), the petitioner was convicted under a federal statute for "loan sharking" activities that took place in the State of New York. In upholding the conviction, the Court made clear that once Congress determines that "a class of activities" affects interstate commerce, it can regulate or prohibit each instance of such activity without "proof that a particular intrastate activity against which a sanction was laid had an effect on commerce." *Id.* at 152.

Congress has determined that firearms transactions are a class of activities that affect interstate commerce. Congress has declared that the "widespread traffic in firearms moving in or otherwise affecting interstate . . . commerce" can only be controlled through federal legislation.[32] These findings clearly evidence Congress' intent to exercise power under the Commerce Clause to reach all

---

[31] *See also United States v. Crandall*, 453 F.2d 1216 (1st Cir. 1972) (holding that *Bass* does not apply to 18 U.S.C. § 922(b) and that the absence of the requirement of an interstate commerce nexus does not make the provision unconstitutional). In *United States v. Evans*, 712 F. Supp. 1435, 1440 (D. Mont. 1989), *appeal pending*, No. 89-30188 (9th Cir.), the court held that Section 922(o)'s prohibition on the possession of a machine gun is a valid exercise of Congressional power under the Commerce Clause.

[32] *See* Pub. L. No. 90-351, § 901(a), 82 Stat. 197, 225 (1968), *reprinted* in, 1 U.S. Code Cong. & Admin. News, 270-71 (1968). These legislative findings were originally contained in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, which was amended by the Gun Control Act of 1968. Although these findings were deleted as "unnecessary" in the Gun Control Act, they remain relevant for determining legislative intent. *See Lebman*, 464 F.2d at 70 n.4.

firearms activity regardless of the connection to interstate commerce of the particular transaction at issue.

CONCLUSION

Because this case presents no substantial question requiring resolution by this Court, and because there is no conflict among the circuits or state courts of last resort on any of the issues involved, *amici* urge that the petition for *certiorari* be denied.

Respectfully submitted,

LLOYD N. CUTLER
JAMES S. CAMPBELL
(Counsel of Record)
GAIL A. ROBINSON
DAVID S. BERNSTEIN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DENNIS A. HENIGAN
Director, Legal Action Project
CENTER TO PREVENT
HANDGUN VIOLENCE
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 289-7319

Attorneys for Amici Curiae

December 13, 1990